

BRB No. 06-0541 BLA

PATRICIA BRITTEN)
(Widow of THEODORE BRITTEN))
)
 Claimant-Petitioner)
)
 v.)
)
 FLORENCE MINING COMPANY)
) DATE ISSUED: 02/22/2007
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand-Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Lindsey M. Sbrolla (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand-Denying Benefits (03-BLA-5677) of Administrative Law Judge Daniel L. Leland on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The miner died on February 12, 2001, and claimant, his widow, filed her claim for survivor's benefits on May 22, 2001. Director's Exhibits 3, 11. Her case is now before the Board for the second time. Initially, the administrative law judge credited the miner with twenty-eight years and ten months of coal mine employment. Applying the regulations pursuant to 20 C.F.R. Part 718, the

administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge further found the evidence did not establish invocation of the irrebuttable presumption of death due to pneumoconiosis provided at 20 C.F.R. §718.304. Accordingly, the administrative law judge denied benefits.

Upon review of claimant's appeal, the Board vacated the administrative law judge's denial of benefits and remanded the case for further consideration. *Britten v. Florence Mining Co.*, BRB No. 04-0947 BLA (Sept. 23, 2005)(unpub.). Specifically, the Board vacated the administrative law judge's finding that claimant did not establish invocation of the irrebuttable presumption by autopsy evidence pursuant to Section 718.304(b), because the administrative law judge failed to render the necessary equivalency determinations in accordance with *Clites v. J & L Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981).¹ *Id.* The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(1)-(2), and that claimant failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a), (c). *Id.*

On remand, the administrative law judge found that the autopsy evidence did not establish the presence of massive lesions of the lung that would show as greater-than-one-centimeter opacities on a chest x-ray. He therefore found that claimant did not establish the existence of complicated pneumoconiosis pursuant to Section 718.304(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in his weighing of the opinions of Drs. Goldblatt and Rizkalla pursuant to Section 718.304(b). Additionally, claimant asserts that each subsection of Section 718.304 provides a "distinct method of establishing the presumption," obviating the need for an equivalency determination. Claimant's Brief at 8. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, because the miner's coal mine employment occurred in Pennsylvania. Director's Exhibit 1; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor’s benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Section 411(c)(3) of the Act, as implemented by Section 718.304 of the regulations, provides an irrebuttable presumption that the miner’s death was due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). Autopsy evidence can support a finding of complicated pneumoconiosis where a physician diagnoses massive lesions or where an evidentiary basis exists for the administrative law judge to make an equivalency determination between the autopsy findings and x-ray findings. *See* 20 C.F.R. §718.304(b); *Clites*, 663 F.2d at 16, 3 BLR at 2-91.

Pursuant to Section 718.304(b), the administrative law judge considered the opinion of Dr. Goldblatt, the autopsy prosector, and the opinions of the reviewing pathologists, Drs. Rizkalla, Oesterling, and Naeye. Dr. Goldblatt diagnosed “complicated coal workers’ pneumoconiosis (progressive massive fibrosis),” based on his observations of anthracotic nodules and macules measuring up to 1.3 centimeters in diameter, and areas of confluent fibrosis measuring up to two centimeters in diameter. Director’s Exhibit 12; Claimant’s Exhibit 1. Dr. Rizkalla diagnosed progressive massive fibrosis, based on his observation that the largest nodule in the miner’s lungs measured 1.3 centimeters in diameter. Claimant’s Exhibit 6. The administrative law judge, however, found that Dr. Goldblatt’s opinion was “undermined by” more probative evidence, and that Dr. Rizkalla’s opinion was “poorly reasoned.” Decision and Order on Remand at 6.

Specifically, the administrative law judge considered Dr. Oesterling’s contrary opinion that the miner’s lung nodules measured six millimeters at the largest, and would appear about the same size on a chest x-ray. Director’s Exhibit 15; Employer’s Exhibit 10. He also took into account Dr. Oesterling’s opinion that there was no confluent fibrosis present in the miner’s lungs, but rather, interstitial changes resulting from

pulmonary congestion caused by the miner's failing heart. The administrative law judge found that Dr. Oesterling "provided a meticulous assessment of the autopsy slides," appending "to his report photomicrographs, magnifying the slides of the miner's lungs." Decision and Order on Remand at 5. The administrative law judge determined that Dr. Oesterling's opinion was "well supported and well reasoned," and he accorded it "substantial weight." *Id.*

Additionally, the administrative law judge considered Dr. Naeye's opinion that the larger lesions and areas of fibrosis that Dr. Goldblatt identified were not related to coal mine employment, but were areas of fibrosis without associated black pigment or silica crystals. Employer's Exhibits 9, 12. Dr. Naeye opined that these areas of fibrosis were most likely small healed areas resulting from localized bouts of pneumonia related to the miner's chronic heart failure. The administrative law judge further considered Dr. Naeye's opinion that a two-centimeter lesion may only appear on x-ray as a one-centimeter opacity, and that, at any rate, there were no two-centimeter lesions in the miner's lung tissue. The administrative law judge found Dr. Naeye's conclusions "buttressed by" those of Dr. Oesterling, and he further determined that Dr. Naeye was "the most qualified physician of record, due . . . to his extensive publication in the field of occupational lung disease."² Decision and Order on Remand at 5-6. He therefore accorded "great weight" to Dr. Naeye's opinion. *Id.*

By contrast, the administrative law judge found that Dr. Goldblatt's opinion was "undermined by" the contrary evidence "revealing that in the areas that he identified as progressive massive fibrosis, Dr. Goldblatt's microscopic examination failed to document characteristics integral to a diagnosis of a coal dust related disease." Decision and Order on Remand at 6. Similarly, the administrative law judge found that Dr. Rizkalla's report was "poorly reasoned, as his findings lack specificity," in that Dr. Rizakalla "failed to comment on either the location or the characteristics of that which he identified," to diagnose complicated pneumoconiosis. Decision and Order on Remand at 5.

Based on these findings, the administrative law judge concluded that the autopsy evidence established that "the nodules in the miner's lungs are no more than 6 mm in size, and that the larger fibrous consolidation is non-occupational in origin." Decision and Order on Remand at 6. The administrative law judge determined that the miner's

² The record reveals that Drs. Oesterling, Goldblatt, Rizkalla, and Naeye are Board-certified in Anatomic and Clinical Pathology. Director's Exhibit 15; Claimant's Exhibit 1 at 3, 7; Unmarked Exhibit. Dr. Naeye's resume lists multiple publications in the field of occupational lung disease. Unmarked Exhibit. Claimant does not challenge the administrative law judge's finding that Dr. Naeye was the most qualified physician.

lung nodules were not large enough to appear as a greater-than-one-centimeter opacity on x-ray, and did not qualify as massive lesions under Section 718.304(b).

Claimant argues that Dr. Goldblatt's observations merited deference because he conducted the autopsy. Claimant's Brief at 5-6. Contrary to claimant's argument, and as the Board stated in its prior decision, the autopsy prosector's opinion is not automatically entitled to greater weight. *Britten*, slip op. at 7 n.7; *see also Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-22-23 (1992).

Claimant argues further that the administrative law judge failed to provide an adequate rationale for discounting the opinions of Drs. Goldblatt and Rizkalla. We disagree. A review of the administrative law judge's decision reflects that he thoroughly considered the autopsy evidence and permissibly chose to accord the opinions of Drs. Oesterling and Naeye greater weight. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). Substantial evidence supports the administrative law judge's findings, and the Board is not authorized to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Finally, for the reasons given in the Board's prior decision, we reject claimant's repeated assertion that no equivalency determination of the autopsy evidence was required. *Britten*, slip op. at 6; *see also Clites*, 663 F.2d at 16, 3 BLR at 2-91. We therefore affirm the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(b).

Because claimant failed to establish invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 718.304, and did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), an essential element of entitlement in a survivor's claim, we affirm the denial of survivor's benefits. *See 20 C.F.R. §718.205(c)*.

Accordingly, the administrative law judge's Decision and Order on Remand-Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge